

arizona municipal water users association

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August 14, 2008

Mr. Doug Dunham
Deputy Assistant Director
Arizona Department of Water Resources
3550 North Central Avenue
Phoenix, Arizona 85012

Dear Mr. Dunham,

The Arizona Municipal Water Users Association (AMWUA) appreciates the efforts of the Arizona Department of Water Resources (ADWR) to try to clarify in rule the transportation of groundwater to an Active Management Area (AMA). However, we have concerns with the current draft of the rules and would like to comment in advance of the formal comment period.

The Groundwater Code generally prohibits the withdrawal of groundwater outside an AMA for transportation to an AMA. The codification of this prohibition was very contentious. The care with which this provision was crafted is indicative of the significance of the public policies that underlie the transportation of groundwater. We urge you to carefully consider the intent of the Legislature regarding groundwater transportation limitations and the statutory construction of laws codifying those limitations.

In the proposed rules, ADWR interprets the statutes authorizing the transportation of groundwater from the Big Chino groundwater sub-basin to allow a city or town to withdraw its entire transportation allotment from any historically irrigated acre (HIA) in the sub-basin owned by the city or town. This interpretation allows a city or town to aggregate its withdrawals from a single parcel of land located anywhere in the sub-basin.

This interpretation is problematic for two reasons. The first reason is that concentrating pumping in a single area, rather than a broader area, could create localized groundwater declines that would be more severe than if the groundwater were pumped from several wells located over a larger area. For example, the Town of Chino Valley has applied for a physical availability determination for the withdrawal of its entire transportation allotment for the Big Chino sub-basin from the Wineglass Ranch, a location significantly closer to the headwater springs of the Verde River than the majority of HIAs in the CV Ranch that the city intends to retire. If this concentrated pumping is allowed, impacts to the flow of the Verde River will occur sooner than if pumping was limited to the location of historically irrigated farms, and would make monitoring and mitigating those impacts more problematic.

The second reason this interpretation is problematic is that it does not comport with general rules of statutory construction. The statutes authorizing transportation of groundwater from the McMullen Valley basin are different than the statutes for the Big Chino sub-basin on the issue of the location of pumping groundwater from HIA lands for transportation to an AMA. The Arizona Legislature enacted the procedures for determining the annual transportation allotment for the Big Chino and for McMullen Valley in the same session and in the same legislative act. For the Big Chino, the Legislature required that ADWR determine the annual transportation allotment for "each farm or portion of a farm." For the McMullen Valley, the Legislature added language requiring that the final step of the calculation aggregate the numbers for "all such farms or portions of farms." If the intent of the Legislature was to allow the aggregation of pumping on HIA lands in the Big Chino sub-basin, the Legislature would have included that provision in statute. However, nothing in the statute authorizes ADWR to aggregate the HIA acres in one "farm" with those of any other "farm" for purposes of calculating the annual transportation allotment in the Big Chino Sub-basin. Simply put, McMullen Valley and the Big Chino should be treated differently because the law treats them differently.

During a public meeting at ADWR, ADWR staff indicated that legislation that was not enacted was relied upon to interpret the requirements for transportation of groundwater from the Big Chino sub-basin. Using legislation that the Legislature did not enact into law to interpret legislation that was enacted into law is inappropriate. Legislation does not pass for a variety of reasons. It may be political, it may be constitutional, or it may be structural. Relying on the history of legislation that did not pass sets an extremely bad precedent for the interpretation of statutes or the development of public policy.

The proposed rules are inconsistent with both the Legislature's intent and the plain language of the statute. ADWR's reliance on legislation that failed to be enacted into law to interpret state law is misplaced. We urge ADWR to redraft the rules to reflect the plain language of the statute and the Legislature's clear intent, as reflected by that language.

Thank you for the opportunity to comment.

Respectfully,



Steven L. Olson
Executive Director